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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 KEITH ABETYTA, an individual,
8 Plaintiff,
9 v.
10 BNSF RAILWAY COMPANY, a
11 Delaware corporation,
12 Defendant.

NO. 2:17-CV-0350-TOR
ORDER DENYING DEFENDANT'S
MOTION TO CERTIFY

13 BEFORE THE COURT is Defendant BNSF Railway Company's Motion to
14 Certify (ECF No. 18). This matter was submitted for consideration without oral
15 argument. The Court has reviewed the record and files herein, the completed
16 briefing and is fully informed. For the reasons discussed below, Defendant's
17 Motion to Certify (ECF No. 18) is **DENIED**.

18 **DISCUSSION**

19 Defendant moves the Court to Certify the Court's Order Denying
20 Defendant's Motion to Dismiss (ECF No. 12) for appeal pursuant to 28 U.S.C.

1 § 1292(b). An Order is appropriate for interlocutory appeal under 28 U.S.C.
2 § 1292(b) if the Order “involves a controlling question of law”; there is
3 “substantial ground for difference of opinion” as to that question; and “an
4 immediate appeal from the order may materially advance the ultimate termination
5 of the litigation[.]” *See* 28 U.S.C. § 1292(b). The Court finds Defendant has failed
6 to demonstrate that there is “substantial ground for difference of opinion” and thus
7 denies Defendant’s Motion.

8 Defendant maintains that *Burnett v. New York Cent. R. Co.*, 380 U.S. 424
9 (1965), “indicates that having personal jurisdiction over a Defendant in the first
10 instance **is a condition precedent** to the application of equitable tolling in a
11 subsequently filed action.” ECF No. 18 at 4 (emphasis in original). This is not
12 correct. That statement is patently overbroad as to the law of equitable tolling
13 because equitable tolling is a “flexible” tool based on equitable considerations that
14 can meet varying, new situations. *See Holland v. Florida*, 560 U.S. 631, 650
15 (2010). Indeed, in justifying its application of the doctrine in *Burnett*, the Supreme
16 Court cites cases involving markedly different facts than *Burnett*. 380 U.S. at 428-
17 29 (reviewing the application of equitable tolling (1) in the context of war and (2)
18 where the Plaintiff was deceived as to the statute of limitations).

19 Had the Supreme Court intended to install rigid, “inflexible” requirements
20 for the application of equitable tolling in FELA cases as Defendant argues, it could

1 have added clear language to that point. It did not. *Burnett*, 380 U.S. at 427
2 (“[T]he FELA limitation period is not totally inflexible, but, under appropriate
3 circumstances, it may be extended beyond three years.”)

4 Defendant also argues equitable tolling is not proper where the Plaintiff
5 forum shopped. ECF No. 18 at 9. Defendant argues that failing to file in a court
6 where jurisdiction is guaranteed is forum shopping, inferring a negative
7 connotation. This is a presumption the Court does not accept. As to the term
8 “forum shopping”, the Ninth Circuit observed, “[a] competent attorney, as part of
9 his ethical obligation to represent his client with reasonable diligence, *see* Model
10 Rule of Professional Conduct 1.3, is obligated to consider various fora and to
11 choose the best forum in which to file a client’s complaint. *Vivendi SA v. T-Mobile*
12 *USA Inc.*, 586 F.3d 689, 695 n.10 (9th Cir. 2009).

13 Even if the Court were to accept Defendant’s reasoning, Plaintiff brought
14 suit in Montana when the then-existing law dictated Montana had general
15 jurisdiction over Defendant. ECF No. 1 at ¶ 7. After *Daimler* was decided in
16 2014, Defendant challenged jurisdiction, but the Montana courts held *Daimler* did
17 not apply to FELA actions. ECF No. 1 at ¶¶ 10-19. Once the Supreme Court ruled
18 otherwise, Plaintiff filed suit in the proper forum. ECF No. 1 at ¶¶ 20-22. These
19 facts do not establish that Plaintiff improperly forum shopped.

20 Defendant also challenges the Court’s conclusion – that applying equitable

1 tolling when Plaintiff files in the wrong court by mistake – serves national
2 uniformity in FELA actions. ECF No. 18 at 9-11. Defendant argues that a transfer
3 to another court is not always granted where equitable considerations counsel
4 against such. However, because the equitable considerations for a transfer would
5 often greatly overlap with the equitable considerations for equitable tolling,
6 uniformity will still be maintained since, in both cases, equitable considerations
7 will ultimately determine whether the case survives the challenge.

8 In sum, Defendant's arguments are untenable or unpersuasive, and thus the
9 Court finds Defendant has failed to demonstrate there is a substantial ground for
10 difference of opinion. Moreover, an immediate appeal will not materially advance
11 the ultimate resolution of the litigation given that trial is just 7 months away and an
12 interlocutory appeal could take substantially more time than that.

13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

14 Defendant's Motion to Certify (ECF No. 18) is **DENIED**.

15 The District Court Executive is directed to enter this Order and furnish
16 copies to counsel.

17 **DATED** March 14, 2018.



18 A handwritten signature in blue ink that reads "Thomas O. Rice".
19 THOMAS O. RICE
20 Chief United States District Judge